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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

SHERRI LYNN WAY,

Defendant and Appellant.

C067797

(Super. Ct. No.
09F01745)

Defendant Sherri Lynn Way entered a plea of no contest to possession of methamphetamine while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)) and was sentenced to state prison for the upper term of four years. On appeal, she contends the trial court erred in denying her motion to suppress evidence. She claims her motion to quash and to traverse the search warrant should have been granted for lack of probable cause because the warrant relied entirely upon information from a confidential informant (CI) or on uncorroborated information

from an untested informant and the officers executing the warrant could not in good faith rely on it. We will affirm the judgment.

Probable cause for the issuance of a search warrant was based upon the affidavit of Sacramento County Sheriff's Detective Salvador Robles, Jr. In the public portion of his affidavit, Detective Robles set forth his extensive training and experience and knowledge gained about narcotic traffickers, and referred the magistrate to the sealed portion of the affidavit (Exhibit A) for details and facts establishing probable cause. Detective Robles requested an order sealing Exhibit A to implement the privilege under Evidence Code sections 1040 to 1042 and to protect the identity of "any confidential informant(s) and/or official information" pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*). Judge Gary Ransom ordered Exhibit A sealed and issued the warrant on February 26, 2009.

On March 3, 2009, pursuant to the search warrant for defendant, defendant's residence, and her vehicles, California Multijurisdictional Methamphetamine Enforcement Team officers went to 5305 Marbury Way in Antelope. The officers entered the residence and arrested defendant and her adult son, Larry Way. Another female was present as was defendant's seven-month-old grandchild, who was taken into protective custody. The officers searched the residence and, in defendant's bedroom, found a loaded handgun on the floor, six bullets, smoking pipes, a scale, a straw with methamphetamine residue, and a total of

2.37 grams of methamphetamine in several types of packaging in different areas of the room.

An amended consolidated information charged defendant with possession of methamphetamine for sale, possession of a firearm by a convicted felon, possession of methamphetamine while armed with a loaded firearm, and possession of ammunition by a convicted felon. In connection with the possession for sale offense, an arming enhancement was alleged. Two prior felony drug convictions were also alleged.

Defendant filed a motion to traverse and quash the search warrant, and to suppress evidence seized pursuant to the warrant or to disclose the CI and unseal Exhibit A. Defendant argued the affidavit failed to establish probable cause, included material omissions and a misstatement of fact, and the CI's information was conclusory, not factual. Specifically, defendant stated, "A review of the police reports in the instant case suggests that the information provided by the informant is made up primarily of conclusions, not facts. Since defense counsel is unable to view any portion of the affidavit, it is up to the court to satisfy itself that facts, not conclusions, support the warrant."

At the suppression hearing, Judge Ronald Tochtermann stated that he had reviewed and considered the entire affidavit, including the sealed exhibit. The court denied the motion to quash and traverse the warrant and to suppress the evidence, finding there was no reason to believe that any material information had been omitted from the affidavit or that there

were any material misrepresentations in the affidavit. The court further found that there was probable cause for issuance of the warrant. The court denied the motion to disclose any part of the sealed portion of the affidavit, finding that to do so would identify the CI.

Hobbs, supra, 7 Cal.4th 948 considered "whether a major portion or all of a search warrant affidavit may validly be sealed in order to protect the identity of a confidential informant, and, if so, what procedures must be followed in order to preserve the defendant's right to challenge the warrant's legality." (*Id.* at p. 955.) *Hobbs* recognized "the inherent tension between the public need to protect the identities of confidential informants, and a criminal defendant's right of reasonable access to information upon which to base a challenge to the legality of a search warrant." (*Id.* at p. 957.) "[T]he sealing of the majority or entirety of the search warrant affidavit "leaves the defendant without an adversary before the court who can not only ascertain that the appropriate challenges are considered but also that the defense argument is vigorously and effectively pursued."" [Citation.]" (*Id.* at p. 964.) But a law enforcement officer has a statutory privilege to refuse to disclose, and to prevent another from disclosing, the identity of a CI. (Evid. Code, § 1041, subd. (a).) *Hobbs* held that "the informant's privilege (§ 1041), the long-standing rule extending coverage of that privilege to *information* furnished by the informant which, if disclosed, might reveal his or her identity, and the codified rule that disclosure of an informant's identity

is not required to establish the legality of a search pursuant to a warrant valid on its face (§ 1042, subd. (b)) compel a conclusion that all or any part of a search warrant affidavit may be sealed if necessary to implement the privilege and protect the identity of a confidential informant. Section 915, subdivision (b), expressly authorizes lower courts to utilize an in camera review and discovery procedure to effectuate implementation of the privilege." (*Hobbs*, at p. 971.)

Hobbs instructed that in evaluating a motion to traverse or quash a warrant, the trial court should conduct an in camera hearing pursuant to Evidence Code section 915, subdivision (b) and *People v. Luttenberger* (1990) 50 Cal.3d 1, 20-24 (*Luttenberger*), "in order to strike a fair balance between the People's right to assert the informant's privilege and the defendant's discovery rights." (*Hobbs*, *supra*, 7 Cal.4th at p. 972.) The trial court must first determine "whether the affidavit is properly sealed, i.e., whether valid grounds exist for maintaining the informant's confidentiality, and whether the extent of the sealing is justified as necessary to avoid revealing his or her identity." (*Id.* at p. 973.) Where all or a portion of the affidavit has been sealed to protect the CI's identity and the defendant has made a motion to traverse the warrant, "the court should treat the matter as if the defendant has made the requisite preliminary showing required under this court's holding in *Luttenberger*." (*Hobbs*, at p. 972, fn. 6.)

At the in camera hearing, the prosecutor may be present but defense counsel and defendant are excluded unless the prosecutor

waives any objection. Defense counsel should be given an opportunity to submit written questions to be asked by the trial court of any witness called to testify. (*Hobbs, supra*, 7 Cal.4th at p. 973.)¹

In a sealed affidavit case, the defendant will generally be unable to specify which materials should be reviewed, so "[t]he court, therefore, must take it upon itself both to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause, and inform the prosecution of the materials or witnesses it requires. The materials will invariably include such items as relevant police reports and other information regarding the informant and the informant's reliability." (*Hobbs, supra*, 7 Cal.4th at p. 973.) Further, "because the defendant's access to the essence of the affidavit is curtailed or possibly eliminated, the lower court may, in its discretion, find it necessary and appropriate to call and question the affiant, the informant, or any other witness whose testimony it deems necessary to rule upon the issues." (*Ibid.*)

After the court finds that the affidavit has been properly sealed, and the defendant has moved to traverse the warrant, "the court should then proceed to determine whether the defendant's general allegations of material misrepresentations

¹ Here, in her motion, defendant did not request an opportunity to submit written questions to be asked of the affiant and CI, nor did she proffer any question.

or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing. Generally, in order to prevail on such a challenge, the defendant must demonstrate that (1) the affidavit included a false statement made 'knowingly and intentionally, or with reckless disregard for the truth,' and (2) 'the allegedly false statement is necessary to the finding of probable cause.' [Citation.]" (*Hobbs, supra*, 7 Cal.4th at p. 974, quoting *Franks v. Delaware* (1978) 438 U.S. 154, 155-156 [57 L.Ed.2d 667, 672].)

"If the trial court determines that the materials and testimony before it do not support defendant's charges of material misrepresentation, the court should simply report this conclusion to the defendant and enter an order denying the motion to traverse. . . . [¶] If, on the other hand, the court determines there is a reasonable probability that defendant would prevail on the motion to traverse—i.e., a reasonable probability, based on the court's in camera examination of all the relevant materials, that the affidavit includes a false statement or statements made knowingly and intentionally, or with reckless disregard for the truth, which is material to the finding of probable cause [citation]—the district attorney must be afforded the option of consenting to disclosure of the sealed materials . . . , or, alternatively, suffer the entry of an adverse order on the motion to traverse." (*Hobbs, supra*, 7 Cal.4th at pp. 974-975.)

Regarding defendant's motion for disclosure of the sealed affidavit, the trial court determined the sealing of the entire exhibit was justified as necessary to avoid revealing the identity of any CI(s). (*Hobbs, supra*, 7 Cal.4th at p. 973.) We have reviewed the sealed portion of the affidavit and agree.

Regarding defendant's motion to traverse, the trial court found that there were no material omissions or misstatements. Based on our review of the sealed portion of the affidavit, we agree.

We are also satisfied that the affidavit, including the sealed portion, supports the magistrate's finding of probable cause. The question is whether from the totality of the circumstances set forth in the affidavit and the oral testimony, if any, presented to the magistrate, there is a fair probability contraband or evidence of a crime will be found at the place to be searched. (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [76 L.Ed.2d 527, 548].) "[T]he warrant can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony." (*Skelton v. Superior Court* (1969) 1 Cal.3d 144, 150; see *Hobbs, supra*, 7 Cal.4th at p. 975.)

We conclude under the totality of the circumstances that the sealed exhibit provides sufficient facts to conclude contraband would be found on defendant, and/or in defendant's

residence, and/or in defendant's vehicles. The affiant set forth sufficient competent evidence of probable cause. The trial court properly denied defendant's motion to quash and traverse the warrant and to suppress the evidence.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

MAURO, J.

HOCH, J.